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Are Strong Constitutional Courts Always a Good Thing for New Democracies?

STEPHEN GARDBAUM*

This Article's starting point is the recent series of direct political attacks by governments on constitutional courts in several new democracies that has had a sobering, if not deflating, effect on what had been the bullish mood concerning the role and success of judicial review in constitutional transitions. It takes the opportunity of these striking episodes to reconsider the standard model and engage in some pragmatic reflection on whether and how, as currently institutionalized, judicial review might sometimes also disserve new democracies in their aspirations to become stable and established ones. The Article argues that, as far as courts are concerned, the most important, basic, and essential goal for transitional democracies is not establishing final authority to invalidate legislation, but establishing and maintaining the independence of the judiciary, and that this latter must be the top priority if and to the extent there is any practical conflict between the two. In fact, both of the key elements of the independence of the judiciary are more likely to be placed under stress when courts have and exercise "strong-form" review powers than when they do not, resulting in additional and unnecessary pressures in an already difficult context. "Weak-form" judicial review

*MacArthur Foundation Professor of International Justice and Human Rights, University of California, Los Angeles, School of Law. This article was conceived and its first version written while I was a Straus Fellow at New York University during 2012–13. Thanks to institute director Joseph Weiler, faculty conveners Sam Issacharoff and Rick Pildes, and fellow Fellows for very helpful comments at the Straus Institute fall workshop at which an outline of this project was presented.

provides an alternative that may permit constitutional courts to perform many of their beneficial functions in the transitional context, but in a less confrontational way that reduces the risk of systemically counterproductive political attacks on judicial independence.

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INTRODUCTION

In the global wave of constitution-making that has taken place and fueled the discipline of comparative constitutional law since 1989, the establishment of constitutional courts has been almost universal, a key part of the standard model of constitutional transition, especially from authoritarianism to democracy.¹ Several explanations have been advanced for this seemingly inexorable growth of judicial review among new democracies. Among these are that: (1) it facilitates the transition to democracy by providing political insurance to existing power holders in the face of uncertain future electoral or political fortunes;² (2) it stabilizes democracy by helping to hedge against one-party consolidation of power;³ (3) it enables constitutional drafters to make their commitments credible;⁴ and (4) more broadly, by limiting politics, it guards against democratic excesses.⁵ In short, the general mood has been bullish on constitutional courts.

In the last few years, however, a series of direct political—not academic—attacks by governments on constitutional courts and judiciaries in several new or less mature democracies has had a sobering, if not deflating, effect. In January 2012, the new Hungarian Constitution, pushed through by the right-of-center Fidesz Government, came into effect, which stripped the constitutional court of important jurisdiction, enabled it to be packed with government supporters, and seriously threatened the independence of the ordinary judiciary.⁶ Two months later, following President Zuma’s statement that the powers of the South African Constitutional Court should be reviewed and the African National Congress (ANC) Secretary General’s description of some of its members as “counter revolutionar[ies],”⁷ the government announced that it was launching

1. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 1–20 (2003).

2. See *id.* at 21–33.

3. Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961 (2011).

4. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE 195 (Jon Elster & Rune Slagstad eds., 1988).

5. See *infra* note 27 and accompanying text.

6. See *infra* Part II.A.

7. Eusebius McKaiser, *Democracy and Its Malcontents*, N.Y. TIMES LATITUDE (Mar. 8, 2012 7:40 AM), <http://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing->

a review of the court to assess the extent to which its decisions had impacted social transformation.⁸ In August 2012, the Romanian Constitutional Court president complained to the Council of Europe of death threats against some of its judges and attacks by the government on its independence.⁹ In Egypt, a series of high profile skirmishes between the electorally successful Muslim Brotherhood and the Supreme Constitutional Court ultimately resulted in a new constitution that restricted the latter's power and removed the most anti-Brotherhood justices before the military stepped in to take power in July 2013.¹⁰ In Sri Lanka, the government impeached the Chief Justice of the Supreme Court in January 2013 following a ruling that one of its prized legislative proposals was unconstitutional and despite the Court's declaration that the impeachment process was illegal.¹¹ In August of 2014, the head of Turkey's Constitutional Court complained of political attacks by the Erdogan Government that had "traumatized and divided the judiciary,"¹² while the President of the Venice Commission expressed concern about excessive government criticisms of the constitutional court.¹³

These attacks amount to the most serious situation facing constitutional courts since President Yeltsin closed the first Russian court in 1993 and raise a number of important questions about judicial review in newer democracies. Should pessimism about their prospects now replace the prevailing optimism? Are courts helpless against such political backlashes? In this Article, I plan to take the opportunity of these striking episodes to reconsider the standard model and engage in some pragmatic reflection on whether and how,

party-resents-the-constitutional-courts-fierce-independence/?_php=true&_type=blogs&_r=0.

8. *See id.*

9. Neil Buckley, *Judges Caught in Romania Power Struggle*, FIN. TIMES, Aug. 7, 2012, available at <http://www.ft.com/intl/cms/s/0/113332a2-e0af-11e1-8d0f-00144feab49a.html#axzz3IL7S34SC>.

10. *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, December 26, 2012, art. 177; *infra* Part II.D.

11. Ranga Sirilal & Shihar Aneez, *Sri Lankan Chief Justice Impeachment Illegal: Supreme Court*, REUTERS, Jan. 3, 2013, available at <http://www.reuters.com/article/2013/01/03/us-srilanka-impeachment-idUSBRE90209D20130103>.

12. Gulsen Solaker, *Turkish Judge Defies Erdogan with Attack on "Dire" Allegations*, REUTERS, Apr. 25, 2014, available at <http://www.reuters.com/article/2014/04/25/us-turkey-judiciary-idUSBREA3017S20140425>.

13. *Venice Commission Head Concerned About Attacks Against Turkish Constitutional Court*, HÜRRİYET DAILY NEWS, Apr. 30, 2014, available at <http://www.hurriyetdailynews.com/venice-commission-head-concerned-about-attacks-against-turkish-constitutional-court.aspx?pageID=238&nID=65788&NewsCatID=359>.

as currently institutionalized, judicial review might sometimes also disserve new democracies in their aspirations to become stable and established ones.

In my recent book, *The New Commonwealth Model of Constitutionalism: Theory and Practice*,¹⁴ I develop the theory and explore the practice of a new general model of constitutionalism that spans the traditional dichotomy of judicial and legislative supremacy. One of its constitutive features is a novel form of judicial review (“weak-form”) that gives courts greater powers to review legislation and other government acts than under the latter, but lesser powers than under the former—in that they do not necessarily or automatically have final legal authority to resolve constitutional issues within the existing constitution.¹⁵ In short, this part of the model decouples judicial review from judicial supremacy or finality (“strong-form review”). In the book, I argue that the case for this new model is generally a compelling one for more established democracies, but leave open the question of its applicability to newer ones—simply claiming a place for it as a general constitutional design option to be considered on its contextual merits.¹⁶ In this Article, spurred by these recent developments, I now want to directly address and explore the questions of when, how, and why it might be relevant for new democracies.

My exploration begins from the premise that, as far as courts are concerned, the most important and basic goal for new democracies in their transition to becoming stable ones is not establishing the power to invalidate legislation, but establishing and maintaining the independence of the judiciary. Judicial review of legislation may or may not be necessary for the rule of law and constitutional democracy¹⁷—reasonable minds and democratic political systems differ on this—but no one contests the essential role of judicial independence. For this reason, securing the latter must be the top priority if and to the extent there is any practical tension or conflict between them.

In fact, both of the two key elements of the independence of the judiciary—judges must be free from government control or pressure in performing their adjudicatory functions and judges should perform these functions impartially, according to the law and facts—

14. STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

15. *See id.* at 21–46.

16. *See id.* at 47–76.

17. Even if not necessary, of course, judicial review may still be legitimate or justified.

are more likely to be placed under stress when courts have and exercise strong-form review powers than when they do not. Accordingly, strong-form judicial review may result in imposing additional and, from a rule of law/constitutional democracy perspective, arguably unnecessary pressures and strains in an already difficult context. At the same time, judicial review can and has performed valuable functions in democratic transitions, as the explanatory theories suggest, so that doing without this institution at all in this context may also sometimes be sub-optimal.¹⁸ Accordingly, weak-form review provides a third alternative to either strong-form review or no judicial review that may perform many of the former's beneficial functions in the transitional context, but in a less confrontational way that reduces the risk of systemically counterproductive political attacks on judicial independence. It is also an alternative to other mechanisms for reducing this risk, such as relying on judicial self-restraint and strategic limitation to "safe" cases.¹⁹

Part I briefly surveys the various existing forms of judicial review and documents the near-universal presence of its strong-form among new and transitional democracies. Part II provides more details of some of the recent actual and threatened political backlashes against courts and what they are backlashes against. Part III argues that judicial independence is the most essential goal and value concerning courts in the transition to stable democracy and explains why, practically, achievement of this goal may be undermined by political reactions to strong-form judicial review. Part IV suggests that weak-form review may sometimes help to reduce this tension as well as spread constitutionalist modes of responsibility and engagement more widely among the political institutions of a fledgling democracy. Finally, Part V reviews and underscores the nature of my claims for weak-form judicial review in this Article, as well as their limits.

18. This is not to deny that sometimes, especially where they were established and captured by the old authoritarian regime prior to democratization, constitutional courts can impede rather than enhance the democratic transition. See Asli Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT'L. J. CONST. L. 666, 698 (2013) (providing an example of a constitutional court impeding democratic transition).

19. See Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117 (2001) (arguing, based primarily on the Russian example, that to survive as independent and legitimate institutions, constitutional courts should avoid highly charged political disputes and strategically limit themselves to "safe" cases).

I. FORMS OF JUDICIAL REVIEW

Since the “third wave” of democratization began in the late-1980s, almost all new and transitional democracies have established judicial review of legislation, following the contemporary norm—or what has been referred to as the “postwar paradigm”—of constitutionalism.²⁰ In terms of the well-known distinction between centralized and decentralized judicial review,²¹ referring to whether the power to invalidate statutes is granted only to a single, specialized constitutional court or to several or all courts, the two models have been adopted in approximately equal numbers by these countries.²²

Not surprisingly, an academic literature has emerged to explain—and sometimes also to justify—the development of judicial review as part of the standard model of constitutional transition from authoritarianism to democracy. According to Tom Ginsburg, judicial review facilitates democracy by providing a form of political insurance to prospective future electoral losers in the face of uncertainty so that the possibility of conceding power if subsequently voted out of office in competitive elections becomes more palatable.²³ This is especially so where the powers of office in the present include appointing members of a constitutional court who will continue to serve under a successor in the event of defeat at the polls.²⁴ For Samuel Issacharoff, constitutional courts play a mediating or “hedging” role in helping to stabilize democracy by offering the prospect of further and ongoing institutional resistance to the type of one-party domination and consolidation of power that has doomed many new democracies.²⁵ Stephen Holmes and Jon Elster have argued that judicial review provides a way for even a dominant political party at the time of constitutional drafting to signal its

20. See GINSBURG, *supra* note 1, at 6–9 (listing seventy-two countries as “third wave” democracies that have adopted a form of judicial review, including virtually every post-Soviet constitution, and many countries in Latin America, Africa, and Asia); see also Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006).

21. This is also sometimes referred to as the distinction between concentrated and diffuse judicial review, or between the European and American models of judicial review.

22. See GINSBURG, *supra* note 1, at 7–8 (listing thirty-four out of the seventy-two new and transitional democracies as adopting constitutional review only by a specialized constitutional court).

23. See *id.*; see also Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587 (2014).

24. See *id.*

25. See Issacharoff, *supra* note 3.

serious intention of abiding by the terms of the constitution, and thereby helps to solve the problem of making its commitments credible.²⁶ And more generally and conventionally, by limiting and checking majoritarian politics, judicial review is thought to guard against potential democratic excesses.²⁷

In addition to the longstanding distinction between centralized and decentralized judicial review, comparative constitutional scholars have identified a newer second one between “strong-form” and “weak-form” judicial review, based primarily on recent constitutional developments in a handful of Commonwealth jurisdictions.²⁸ The essence of this second distinction is whether or not, short of the standard possibility of constitutional amendment to overrule a judicial decision, courts are given final and unreviewable legal authority to determine the validity and continuing enforceability of legislative acts.²⁹ Under the regular and dominant form of judicial review—whether centralized or decentralized—they are. Indeed, both the power of invalidation and the finality of the decision of a constitutional court (centralized) or the highest court in the case (decentralized) almost go without saying as an automatic or inherent feature of judicial review.

The novelty of weak-form judicial review, by contrast, is that although courts are empowered to engage in constitutional review of legislation—that is, to assess the compatibility of statutes with a bill of rights or other constitutional provisions—their judgment is not necessarily or automatically the legally authoritative one as legislatures are entitled to insist on the continuing enforceability and validity of a statute deemed incompatible by a court within the existing, unamended bill of rights or constitution. This legislative

26. See ELSTER, *supra* note 4; Holmes, *supra* note 4.

27. See Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); see also Mattias Kumm, *Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 1, 1 (2007).

28. See GARDBAUM, *supra* note 14; MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 759 (2001); Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

29. The common practice, in Canada and elsewhere, whereby legislatures respond to judicial invalidation by re-enacting modified statutes—under proportionality tests or otherwise—is part and parcel of contemporary strong-form judicial review and does not in practice negate the judicial final word, however the courts choose to exercise it in subsequent litigation. See Grant Huscroft, *Constitutionalism From the Top Down*, 45 OSGOODE HALL L.J. 91 (2007).

power can and does take two main forms. In Canada, a judicial decision is authoritative unless affirmatively overridden by parliamentary vote.³⁰ In the other jurisdictions adopting this model, the exercise of judicial review is declaratory only, and thus without any legal consequences for a statute in the absence of subsequent legislative amendment or repeal.³¹

Conceptually, these two distinctions among types of judicial review are cross-cutting ones, in that both a centralized and decentralized system of judicial review could be either strong or weak.³² In practice, however, since the beginning of the third wave of democratization, where new and transitional democracies have established judicial review (which, as we have seen, is virtually everywhere) it has almost all been of the strong-form variety.³³ Although weak-form judicial review has been in existence at least since 1982, with subsequent variations enacted in 1990 and 1998, thus far it has mostly been limited to established democracies; indeed, it has been limited to established parliamentary democracies of the Westminster-type within the Commonwealth.³⁴ The two main

30. Canadian Charter of Rights and Freedoms § 33(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, or sections 7 to 15 of this Charter.”).

31. This is the case in the United Kingdom, the Australian Capital Territory, and the State of Victoria. In New Zealand, courts are not expressly empowered to issue such declarations of incompatibility, although a judgment of incompatibility is implicit in the courts’ decision to apply section 4 of New Zealand Bill of Rights (NZBORA). See Paul Rishworth, *The Inevitability of Judicial Review under “Interpretive” Bills of Rights: Canada’s Legacy to New Zealand and Commonwealth Constitutionalism?*, in CONSTITUTIONALISM IN THE CHARTER ERA 233 (G. Huscroft et al. eds., 2004). In these jurisdictions, judicial rights decisions may also be interpretive rather than declaratory, under one of several provisions requiring courts to give rights-consistent interpretations of statutes wherever possible, regardless of more traditional and constrained modes of statutory interpretation. See *e.g.*, Human Rights Act, 1988, § 4 (Eng.); Bill of Rights Act 1990 § 4 (N.Z.). Such statutory interpretations may be overridden by ordinary legislative vote in the usual way.

32. Examples of centralized weak-form judicial review are Romania and Poland. See *infra* notes 35–37 and accompanying text.

33. No country in Ginsburg’s list has a version of weak-form review. See GINSBURG, *supra* note 1, at 7–8.

34. Israel and Ireland are partial exceptions to this latter proposition, in that as non-Commonwealth members, they have institutionalized limited, but not full, versions of weak-form judicial review. In Israel, the Basic Law: Freedom of Occupation, one of twelve Basic Laws, was reenacted in 1994 with a “notwithstanding” provision (in section 8) permitting the Knesset to immunize a statute from the Basic Law by a majority vote of its members if

exceptions among new or transitional democracies were Poland between 1986 and 1997 and Romania between 1991 and 2003, where a two-thirds majority of parliament was empowered to override a decision of the constitutional court.³⁵ In the case of Poland, the override was originally part of the limited concessions of the then-still governing Communist Party to the democracy movement.³⁶ By contrast, under the main current version of weak-form review, within the Commonwealth jurisdictions, the legislature is empowered to exercise its power by ordinary majority vote.³⁷

II. BACKLASHES

If the general mood has been bullish on constitutional courts and judicial review in transitional democracies, at least since the Second Russian court replaced the suspended First one in 1995,³⁸ 2012 was the year that should give pause. For the series of actual and threatened political backlashes against courts calls into question this Whig interpretation of history and reminds us of the continuing

expressly so stated when enacted. In passing the European Convention on Human Rights Act 2003, Ireland borrowed much of the structure of the United Kingdom's Human Rights Act 1998, including the judicial declaration of incompatibility mechanism. However, within the Irish legal system this amounts to a supplementary set of statutory rights (incorporating those under the European Convention on Human Rights) in addition to those already contained in its supreme law constitution with full powers of judicial review. *But cf.* Rivka Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, 62 AM. J. COMP. L. 127, 168–69 (2014) (arguing that the process of constitution-making rather than constitutional text or powers should determine classification as a new Commonwealth model jurisdiction and that, under this criterion, Israel and certain central and eastern European countries qualify for inclusion).

35. See Lech Garlicki, *The Experience of the Polish Constitutional Court*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE CONTEXT 265 (Wojciech Sadurski ed., 2002). In the Romanian case, the override could be used only on abstract review before a statute was promulgated. See CONSTITUȚIA ROMÂNIEI [CONSTITUTION OF ROMANIA] art. 145 (abolished by constitutional amendment in 2003 as part of Romania's successful application to join the European Union).

36. See Garlicki, *supra* note 35.

37. See GARDBAUM, *supra* note 14, at 31–32.

38. See Epstein, Knight & Shretsova, *supra* note 19; see also Herbert Hausmaniger, *Towards a "New" Russian Constitutional Court*, 28 CORNELL INT'L L.J. 349 (1995) (describing and analyzing the judicial, extra-judicial, and presidential actions leading to the suspension of the First Russian Constitutional Court in 1993 and its replacement by the Second in 1995).

fragility of transitions to stable democracy.³⁹ From this perspective, such episodes seem clearly counterproductive, backward steps, and must be taken into account in any overall framework of institutional design and interactions.

A. Hungary

Probably the best-known and most visible backlash has been in Hungary, where the new 2012 constitution pushed through parliament by the supermajority supporting the right-of-center Fidesz government of Prime Minister Viktor Orban heavily targets both the constitutional and ordinary courts.⁴⁰ With respect to the Constitutional Court, the new constitution expanded the number of judges from eleven to fifteen⁴¹ and the government filled the new positions with their political allies by a straight two-thirds vote, abandoning the prior consensus procedure. As a result, the opposition parties had no say in the appointments.⁴²

The new constitution also restricted the Constitutional Court's jurisdiction in two ways. First, as part of its budget balancing orientation, it prohibits judicial review of any law with an impact on the budget unless it infringes particular listed rights.⁴³ Second, the distinctive Hungarian *actio popularis* procedure for *ex post* abstract review of a law or regulation by ordinary citizens was abolished and replaced with a German-style constitutional complaint for *ex post* concrete review, which is available only after other remedies have been exhausted.⁴⁴ In addition, the "mega" Fourth Amendment to the new constitution of March 2013 annuls all the court's decisions prior

39. Samuel Issacharoff's term "fragile democracies" nicely captures this point. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

40. After the 2010 elections, Fidesz held 68% of the seats in the unicameral parliament although it received less than 53% of the vote in the combined single member and party list electoral system. See A.L.B., *Business as Usual in Budapest*, ECONOMIST: EASTERN APPROACHES (Apr. 19, 2011, 1:57 PM), http://www.economist.com/blogs/easternapproaches/2011/04/hungarys_controversial_constitution.

41. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24 (8).

42. See Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement, Part I*, VERFASSUNGSBLOG (Aug. 9, 2012), <http://www.verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age/#.VHYky03wt9B>.

43. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], art. 24(4).

44. *Id.* at art. 24(2)(d).

to the new constitution so that they cannot be relied upon.⁴⁵

As for the ordinary courts, the government lowered the retirement age for judges from seventy to sixty-two, resulting in the forced retirement and replacement of more than 200 judges. The new law on the judiciary also requires the president of the Supreme Court to have had at least five years of Hungarian judicial experience, which disqualified the sitting president who had served on the European Court of Human Rights for seventeen years. The law also created a National Judicial Office headed by a single person with the power to replace the retiring judges, name future ones, and move any sitting judge to a different court. The subsequent Fourth Amendment enshrined this office in the constitution and permits its head to choose which court shall hear each case.⁴⁶

This attempt by the government to curb the Constitutional Court is a clear—albeit delayed—response to its record during the period in which it was widely viewed as the most activist in the world. Starting immediately upon its creation in 1990, the Hungarian Constitutional Court under its first President, László Sólyom, issued a series of decisions striking down laws on such topics as the death penalty,⁴⁷ sexual orientation discrimination,⁴⁸ and the government's austerity program,⁴⁹ which received huge attention nationally and internationally.⁵⁰ Between 1989 and 1995, one study calculates that the court invalidated one-third of all pieces of legislation it reviewed.⁵¹ This lasted until the end of Sólyom's first nine-year term

45. *Id.* at amend. IV, art. 19(2); Kim Lane Scheppele, *Constitutional Revenge*, N.Y. TIMES, Mar. 1, 2013, available at <http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge> (describing the Fourth Amendment as a “mega” amendment).

46. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] amend. IV, art. 14.

47. Alkotmánybíróság (AB) [Constitutional Court] Oct. 24, 1990, 23/1990 (Hung.).

48. *Id.* at 14/1995 (Hung.) (The principle of equal dignity requires same treatment of heterosexuals and homosexuals in domestic partnership law.).

49. Alkotmánybíróság (AB) [Constitutional Court] June 30, 1995, 43/1995 (Hung.) (invalidating government's austerity program).

50. See, e.g., LÁSZLÓ SOLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (2000); Gabor Halmai, *The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE CONTEXT 189 (Wojciech Sadurski ed., 2002); Kim Lane Scheppele, *The New Hungarian Constitutional Court*, 8 E. EUR. CONST. REV. 81 (1999); Spencer Zifcak, *Hungary's Remarkable, Radical, Constitutional Court*, 3 J. CONST. L. E. & CENT. EUR. 1 (1996).

51. See Issacharoff, *supra* note 3, at 973 (citing Kim Lane Scheppele, *Democracy by*

in 1998 and his non-reappointment by none other than then-new Prime Minister Viktor Orban, who replaced him with the more traditional positivist judge, János Németh.⁵²

Orban's chance to make further changes was put on hold when his Fidesz party—which held a plurality but not a majority of seats in parliament—was voted out of office in 2002.⁵³ Having returned to power in 2010, this time with a supermajority,⁵⁴ Orban appears to have taken full political advantage of his second chance to undermine judicial independence by means of these recent, more comprehensive measures. The net result of these and more general changes brought about by the new constitution is a serious concern that Hungary may be veering back towards authoritarian rule.

B. South Africa

If Hungary's Constitutional Court was frequently viewed as the most activist in the world in the 1990s, that mantle passed to the South African court during the 2000s following the two widely internationally admired decisions operationalizing the judicial enforceability of socio-economic rights: *Grootboom* (2000) and *Treatment Action Campaign* (2002).⁵⁵ These were far from its only acts of broad social reform. Like the Hungarian court before it, the South African court's very first decision, in 1995, invalidated the country's death penalty law.⁵⁶ It made South Africa one of the first countries to legalize same-sex marriage as a result of its unanimous 2005 ruling that the country's existing marriage laws violated the constitutional right to equality by unfairly discriminating on the basis of sexual orientation and giving parliament one year to amend

Judiciary (Or, Why Courts Can be More Democratic than Parliaments), in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 25, 44 (Adam Czarnota, et al. eds., 2005)).

52. Until the post-2010 changes, which created a single twelve-year term, constitutional court judges were permitted to have their nine-year terms renewed once. 1989. évi XXXII. törvény az Alkotmánybíróságról (Act XXXII of 1989 on the Constitutional Court) art. 8(3) (Hung.).

53. *Historical Archive of Parliamentary Election Results: Elections Held in 2002*, INTER-PARLIAMENTARY UNION, http://www.ipu.org/parline-e/reports/arc/2141_02.htm (last visited Nov. 2, 2014).

54. *Hungarian Center-Right Wins Supermajority*, B92 (Apr. 26, 2010, 10:25 AM), http://www.b92.net/eng/news/region.php?yyyy=2010&mm=04&dd=26&nav_id=66725.

55. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.); *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (1) SA 46 (CC) (S. Afr.).

56. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

them.⁵⁷ In 2011, the Court declared the government's abolition of an independent corruption unit unconstitutional and ordered it to create a new one,⁵⁸ and also prohibited President Zuma from extending the term of Chief Justice Ngcobo as he had planned to do.⁵⁹

Inevitably, given its position as the dominant political party, the major object of the court's exercise of its strong-form judicial review powers has been the governing ANC, creating growing tensions between the two. These tensions were manifested by President Zuma's subsequent nomination of Mogoeng Mogoeng—the “most conservative justice on the current court,”⁶⁰ the most likely to defer to executive action, and an explicit opponent of same-sex marriage—as the new Chief Justice in 2011 to the general dismay of the legal community.⁶¹ But even after the nomination, the periodically expressed hostility of the ANC towards the court continued. In early 2012, President Zuma stated that the powers of the court should be reviewed, and the ANC Secretary General described some of its members as “counter revolutionaries.”⁶² Finally, in March of that year the government announced it was launching a review of the court to assess the extent to which its decisions had impacted (i.e., hindered) socio-economic transformation.⁶³

C. Romania

In July and August 2012, the Romanian Constitutional Court became caught up in the power struggle between right-of-center President Basecu and Social Democratic Prime Minister Viktor Ponta that culminated in an attempt to impeach Basecu.⁶⁴ In the process, members of the court complained to the Council of Europe's Venice

57. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) (S. Afr.) (One justice dissented from the remedy of the suspended declaration of invalidity and would have immediately read a right to same-sex marriage into the statute.).

58. Glenister v. President of the Republic of S. Afr. 2011 (3) SA 347 (CC) (S. Afr.).

59. Justice Alliance of S. Afr. v. President of the Republic of S. Afr. 2011 (5) SA 388 (CC) (S. Afr.).

60. Pierre De Vos, *On the Appointment of a Chief Justice*, CONSTITUTIONALLY SPEAKING (July 29, 2011), <http://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice>.

61. *See id.*

62. *See* McKaiser, *supra* note 7.

63. *See* McKaiser, *supra* notes 7–8 and accompanying text.

64. Buckley, *supra* note 9.

Commission, as well as senior European officials, of pressure from the government—including death threats against some of its judges—pending its two decisions in the impeachment process.⁶⁵ In the first, it held that a government decree reducing the required turnout below the previous threshold of fifty percent of registered voters for a valid impeachment referendum was invalid.⁶⁶ It subsequently ruled that this threshold had not been met,⁶⁷ despite eighty-seven percent of those voting supporting Basecu's dismissal and government claims that the voting lists were severely out of date, given the scope of recent emigration among other reasons.⁶⁸ Apart from denying the court's death threat allegations, the government countered by questioning the court's independence, pointing out that a majority of its judges were appointed by its political opponents and accusing it of acting as a political body.⁶⁹

This was not the first clash between the two branches. Like the Hungarian court in the 1990s, in 2010, the Romanian Constitutional Court had invalidated part of the previous government's austerity program, demanded by international financial institutions, when it held that proposed pension cuts were unconstitutional.⁷⁰ In response, the government had felt forced to raise the national value added tax from nineteen percent to twenty-four percent for all Romanians, the second highest in the European Union.⁷¹

65. The power struggle itself is in part due to uncertainty in the constitutional text of the respective powers of the two executive offices. *See id.*

66. Michael Haggerson, *Romania Court: Majority of Electorate Must Turn Out for Vote to Remove President*, JURIST (July 11, 2012, 7:52 AM), <http://jurist.org/paperchase/2012/07/romania-court-majority-of-electorate-must-turn-out-for-vote-to-remove-president.php>.

67. The turnout was 46.2% of officially registered voters. *See Romanian Court Declares Impeachment Referendum Void*, GUARDIAN, Aug. 21, 2014, available at <http://www.theguardian.com/world/2012/aug/21/romanian-court-declares-referendum-void>.

68. *See id.*

69. *See* Buckley, *supra* note 9.

70. Political Capital, *Independent Constitutional Courts: One Man's Joy is Another Man's Pain*, RISK & FORECAST (July 2, 2010), <http://riskandforecast.wordpress.com/2010/07/02/independent-constitutional-courts-one-mans-joy-is-another-mans-pain>.

71. *Id.*

D. Egypt

Also in August of 2012, the government of then-President Morsi in Egypt announced that it was considering restricting the powers of the courts and purging anti-Islamist judges appointed during the Mubarak era. The struggles between the courts and the new president continued in November, when Morsi announced an executive decree temporarily immunizing his actions from judicial review, which sparked renewed resistance and violence on the part of his opponents.⁷²

In December, the newly approved constitution reduced the size of the Supreme Constitutional Court (SCC) from nineteen to eleven members, retaining the ten longest serving members plus the chief justice.⁷³ This was widely viewed as a political move to get rid of the most anti-Muslim Brotherhood justices, including the court's only female member, Tahani El-Gebali.⁷⁴ Article 177 of this constitution also reduced the jurisdiction of the SCC by limiting judicial review of the constitutionality of laws governing presidential and parliamentary elections to the period before they are promulgated.⁷⁵ This was aimed at preventing a repeat of the Mubarak-appointed Court's dissolution of a sitting (and Islamist-dominated) parliament in June of 2012, two days before the second round of presidential elections, on the basis that the new election law had resulted in one-third of legislators being elected illegally.⁷⁶ For some, these measures of the Morsi government were a backlash to this ruling of the SCC, which was executed by the military, and an escalation of the continuing conflict between Islamist and secular forces. This conflict, of course, came to a head with the army's removal of Morsi from office in July of 2013, its sustained

72. See Jeffrey Fleishman & Reem Abdellatif, *Egypt President Mohamed Morsi Expands Authority in Power Grab*, L.A. TIMES, Nov. 22, 2012, available at <http://articles.latimes.com/2012/nov/22/world/la-fg-egypt-morsi-powers-20121123>.

73. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, November 30, 2012, art. 176.

74. Connor Molloy, *Why the Reduction in SCC justices?*, DAILY NEWS EGYPT (Dec. 24, 2012), <http://www.dailynewsegypt.com/2012/12/24/why-the-reduction-in-scc-justices>.

75. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, November 30, 2012, art. 177 ("The President of the Republic or [Parliament] shall present draft laws governing presidential, parliamentary or local elections before the Supreme Constitutional Court, to determine their compliance with the Constitution prior to their dissemination.").

76. *Egypt's Supreme Court Dissolves Parliament and Outrages Islamists*, GUARDIAN, June 14, 2012, available at <http://www.theguardian.com/world/2012/jun/14/egypt-parliament-dissolved-supreme-court>.

crackdown on the Muslim Brotherhood, the new presidency of General el-Sisi, and the replacement of the December 2012 constitution with the current one, approved by ninety-eight percent of the vote in January of 2014.

E. Sri Lanka

On November 1, 2012, a decision by a panel of the Sri Lankan Supreme Court, presided over by Chief Justice Shirani Bandaranayake, held that various parts of the government's controversial Divi Neguma ("uplifting lives") Bill were inconsistent with both procedural and substantive provisions of the 1978 constitution. As a result, either a two-thirds vote of the legislature (under Article 84(2)) or, in the case of Clause 8(2) of the Bill, such a vote plus a referendum (under Article 154) were required for enactment.⁷⁷

The following day, 117 governing party members of parliament signed a motion to impeach the Chief Justice on charges of unexplained wealth and misuse of power.⁷⁸ The initial parliamentary panel vote to impeach was confirmed by the full body in early January 2013, whereupon then-Sri Lankan President Mahinda Rajapaska removed her from office despite a Supreme Court ruling that the impeachment process was illegal and a decision of the Court of Appeal quashing the findings of the parliamentary panel.⁷⁹ It was reported that two of the latter court's judges received death threats.⁸⁰ President Rajapaska nominated former Attorney General and political ally Mohan Peiris to replace Bandaranayake, who was sworn into office on January 15.⁸¹ At the same time, the legislature amended the provision of the Bill that the Court had held

77. *Divi Neguma Needs Two-Thirds Majority and Referendum to be Passed in Present Form: SC*, DAILY FT (Nov. 7, 2012 1:07 AM), <http://www.ft.lk/2012/11/07/divi-neguma-needs-two-thirds-majority-and-referendum-to-be-passed-in-present-form-sc>.

78. *Sri Lanka Ruling Party MPs Move to Impeach Top Judge*, EXPRESS TRIBUNE (Nov. 1, 2012), <http://tribune.com.pk/story/459260/sri-lanka-ruling-party-mps-move-to-impeach-top-judge>.

79. See Sirilal & Aneez, *supra* note 11.

80. *Appeal Court Judges Get Threatening Calls*, DAILY MIRROR (SRI LANKA) (Jan. 8, 2013, 5:43 PM), <http://www.dailymirror.lk/top-story/24844-appeal-court-judges-get-threatening-calls.html>.

81. See *Sri Lanka: New Chief Justice Sworn In*, N.Y. TIMES, Jan. 15, 2013, available at <http://www.nytimes.com/2013/01/16/world/asia/sri-lanka-new-chief-justice-sworn-in.html>.

required a referendum and voted the remainder into law by the necessary two-thirds majority.⁸²

F. Turkey

Finally, in Turkey, the longstanding tension between the “moderate” Islamist Erdogan government and the traditionally secularist Constitutional Court erupted again in mid-2014 in a series of mutual accusations and veiled threats.⁸³ This followed the Court’s invalidation of the government’s bans on Twitter⁸⁴ and YouTube⁸⁵ in April and May, and part of the law increasing its control over, and reducing the independence of, Hâkimler ve Savcılar Yüksek Kurulu (HSYK), the supreme board of judges and prosecutors, also in April.⁸⁶ These government measures had all been taken in the immediate context of the ongoing criminal investigations into allegations of widespread corruption within the ruling Freedom and Justice Party (AKP), reaching all the way to Erdogan and his family. These allegations have been strenuously denied by the government and attributed to a conspiracy against it by a former ally, the powerful imam in exile Fethullah Gülen, whose followers are said to occupy high positions in the ordinary judiciary and prosecution service.⁸⁷ The Justice Minister, Bekir Bozdag, whose power was decreased by the HSYK decision, accused the president of the Constitutional Court of acting as the new political opposition, with the judge responding that the government’s excessive criticisms have

82. See *Divi Neguma Bill Passed*, COLOMBO GAZETTE (Jan. 8, 2013 7:59 PM), <http://colombogazette.com/2013/01/08/divi-neguma-bill-passed>.

83. See Bâli, *supra* note 18 (describing previous skirmishes between the constitutional court and the AKP government).

84. See Ceylan Yeginsu, *Turkey Lifts Ban on Twitter After Court Calls it Illegal*, N.Y. TIMES, Apr. 3, 2014, available at http://www.nytimes.com/2014/04/04/world/middleeast/turkey-lifts-ban-on-twitter.html?_r=1.

85. See Erika Johnsen, *Top Court to Turkish PM: Sorry, But You Can’t Block YouTube, Either*, HOT AIR (May 31, 2014, 7:01 PM), <http://hotair.com/archives/2014/05/31/top-court-to-turkish-pm-sorry-but-you-cant-block-youtube-either>.

86. See Solaker, *supra* note 12; *Venice Commission Head Concerned about a Tax Against Turkish Constitutional Court*, *supra* note 13; see also Dorian Jones, *Tensions Rise Between Turkey’s Government and Courts*, VOICE OF AMERICA (Apr. 15, 2014, 3:57 PM), <http://www.voanews.com/content/tensions-rise-between-turkeys-government-and-courts/1894177.html>.

87. See Suzy Hansen, *A Guy Who Lives in Pennsylvania May be Taking Down the Entire Turkish Government: A Profile of Fetullah Gulen, the Prime Minister’s Greatest Enemy*, NEW REPUBLIC, Dec. 26, 2013, available at <http://www.newrepublic.com/article/116044/fethullah-gulen-turkish-prime-minister-erdogans-biggest-rival>.

traumatized and divided the judiciary.⁸⁸

Whatever the rights and wrongs of these government backlashes, and indeed of the judicial actions that triggered them, from a purely practical and pragmatic perspective they are clearly not helpful episodes. They threaten to undermine the transition process towards stable democratization and, in some cases, risk a reversion towards authoritarianism. Where constitutional courts do in fact increase the risk of counterproductive political backlashes within fragile democracies, and are unable or unwilling to exercise judicial self-restraint in appropriate circumstances, then external supplementation may sometimes be called for—in the form of constitutional arrangements that reduce the power of judicial review.

III. INDEPENDENCE OF THE JUDICIARY: THE MOST ESSENTIAL GOAL FOR COURTS IN NEW DEMOCRACIES

The premise of my argument in this Article is that, as far as courts are concerned, the most important, basic, and essential goal for new democracies in their transition to becoming stable ones is *not* establishing the power of one or more courts to invalidate legislation, but establishing and maintaining the overall independence of the judiciary. Judicial review may or may not be (instrumentally or normatively) necessary for the rule of law and constitutional democracy,⁸⁹ but the independence of the judiciary undoubtedly is, and securing the latter must be the top priority if and to the extent there is any practical tension or conflict between them.⁹⁰ While certainly among stable, established democracies there are several well-known examples of countries that long rejected judicial review, and a few that still do, there are none that do not adhere to the basics of an independent judiciary.⁹¹ Moreover, although there is a robust

88. See Solaker, *supra* notes 12; *Venice Commission Head Concerned about a Tax Against Turkish Constitutional Court*, *supra* note 13.

89. See, e.g., Justice John Dyson Heydon, Lecture at the Oxford Faculty of Law: Are Bills of Rights Necessary in Common Law Systems? (Jan. 23, 2013) (outline available at http://www.innertemple.org.uk/downloads/members/lectures_2013/lecture_heydon_2013.pdf).

90. To say that the independence of the judiciary is necessary for the rule of law and constitutional democracy is not to deny that in specific contexts, the complete or absolute autonomy of the judiciary and insulation from any form of democratic accountability can serve to impede rather than enhance a democratic transition. For the Turkish example, see Bâli, *supra* note 18.

91. In distinguishing between judicial review and the independence of the judiciary, I am obviously rejecting a view that sees judicial review as necessary for, or constitutive of,

academic debate within constitutional/democratic theory between proponents and opponents of judicial review, no one, to the best of my knowledge,⁹² argues against the central importance of judicial independence.

It is true that the classical notion of separation of powers between three of the major functions of government—making, executing, and adjudicating the law—has been under almost permanent siege ever since it was fully formulated by the end of the eighteenth century. The perceived necessity of the institutional separation between the executive and legislative branches (King and Parliament) was undermined first by the subsequent birth of parliamentary government in the nineteenth century that famously “fused” them⁹³ and then by the growth of modern political parties as the central locus of political competition in both parliamentary and presidential systems.⁹⁴ The later development of the administrative state and its increasing functional independence of the executive challenged the “holy trinity” of government branches.⁹⁵ But what has *not* changed or come under siege is the perceived importance of the institutional separation of the judicial function from the others—usually referred to as the independence of the judiciary. This independence was first achieved in England by the 1701 Act of Settlement, granting life tenure to His Majesty’s judges during good behavior (removable only on proof to the contrary by parliamentary impeachment) and ending royal assertions of a power to dismiss.⁹⁶

To be sure, such separation does not require that courts be hermetically insulated from the other branches. Judicial independence does not—and has never been understood to—mean complete judicial autonomy or self-governance. For just under three hundred years, members of the independent judiciary in England were appointed in the monarch’s name by the Lord Chancellor, who served simultaneously as head of the judiciary and as a senior cabinet

such independence, contrary to the account, for example, of Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 353–54 (2009).

92. As distinct from the type of criticism that particular judiciaries are not sufficiently independent or, more rarely, too independent (for example, Turkey and India).

93. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (1867).

94. See Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (discussing the presidential system in the U.S. context).

95. See EOIN CAROLAN, *THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE* (2009).

96. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 § 3 (Eng.).

minister.⁹⁷ Among established democracies, judicial autonomy currently varies in degree from the near-total self-governance of Higher Judicial Councils in Italy and Spain and the collegium system in India, to independent judicial appointment commissions on which judges are usually in a minority, as in the United Kingdom, to the more traditional roles of ministers of justice in promotion decisions as mostly in Germany and France.⁹⁸ Legislatures typically play a significant role in the appointment of constitutional court judges.⁹⁹

As is well known, the independence of the judiciary has two key elements. First, judges should be free from government control, pressure, or influence in performing their adjudicatory functions.¹⁰⁰ The situation in China, where the work of judges is closely supervised by both local governments and the Communist Party with direct power over salaries and promotions, may serve as a paradigm of non-independence in this regard.¹⁰¹ Second, judges should perform these functions impartially, without political, partisan, or personal bias, and according to the law and facts.¹⁰² Here, for example, the election and re-election of state court judges in the United States, especially where campaign contributions by potential litigants are involved, raise concerns about this second dimension of independence. Of course, the first element is one of the preconditions of the second: freedom from government control enables judges to adjudicate impartially—although it does not guarantee it.

97. The Lord Chancellor's position as head of the judiciary and traditional role in the appointment of judges were abolished by the Constitutional Reform Act 2005. On the new appointments process, see *infra* note 118.

98. See Anja Seibert-Fohr, *Introduction: The Challenge of Transition*, in JUDICIAL INDEPENDENCE IN TRANSITION 1, 9 (Anja Seibert-Fohr ed., 2012).

99. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 538–40 (3d ed. 2014).

100. I am bracketing for current purposes such refinements of these basic elements as internal (*vis-à-vis* more senior judges or courts) versus external (*vis-à-vis* non-judicial institutions) independence, or the independence of the individual judge versus that of the judiciary as a whole.

101. Sherrod Brown & Christopher Smith, *Judicial Independence in the PRC*, Congressional-Executive Commission on China, <http://www.cecc.gov/judicial-independence-in-the-prc> (last visited Dec. 28, 2014).

102. See, e.g., Organization for Security and Co-operation in Europe (OSCE), Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe 7 (participating states promised to ensure “the right to a fair and public hearing within a reasonable time before an *independent and impartial* tribunal.”) (emphasis added).

My claim is that *both* elements of the independence of the judiciary are more likely to be placed under stress when courts have and exercise strong-form judicial review powers than when they do not. That is, there may be a practical tension and conflict between the independence of the judiciary and judicial review resulting in additional—and, from a rule of law/constitutional democracy perspective, *unnecessary*—pressures and strains in an already difficult context. Unnecessary because just as judicial independence is not equivalent to and does not require full autonomy from the other branches of government,¹⁰³ so too it is not equivalent to and does not require judicial supremacy over them. In other words, although there is no single model for ensuring judicial independence,¹⁰⁴ there may be a single model for endangering it in the particular context of new and transitional democracies.

The basic reason is that judicial review has a tendency to result in the politicization of the courts in two ways that correspond to, and jeopardize, the two key elements of judicial independence. On the first element, where a court has final authority on the validity of legislation—whether in the context of abstract review or concrete litigation—it inevitably becomes a powerful political actor as a veto player (Kelsen’s “negative lawmaker”¹⁰⁵), and so may come to be viewed as an opponent or potential rival of the government. It may serve as an effective check on politics, but, in so doing, it may also trigger political attacks that threaten to reduce the judiciary’s independence. If, in one sense, judicial review exhibits the independence of the judiciary to its greatest extent, for that very reason it also poses the greatest practical threat to such independence—and in service of a function that is not an essential part of it. Just as the fusion of executive and legislative power in nineteenth century Britain initially seemed to manifest parliamentary strength by confirming its primacy over the monarch, but eventually undermined the independence of Parliament, so too in the context of new and transitional democracies the partial fusion of judicial and legislative power that is judicial review may end up undermining the independence of the courts.

The pragmatic response to the fragility of judicial independence in new democracies is to protect and nourish it by reducing the potential pressures it faces, not maximizing them.

103. Indeed, such full autonomy can, in certain contexts, impede democratic transition. See, e.g., Bâli, *supra* note 18.

104. See JUDICIAL INDEPENDENCE IN TRANSITION, *supra* note 98, at 9.

105. Hans Kelsen, *La Garantie Juridictionnelle de la Constitution*, 44 REVUE DE DROIT PUBLIC 197 (1928).

Courts should not be cast in the role of the first or only line of defense. Exercises of judicial review can place great strain on a fledgling or brittle democracy, as the examples of the Egyptian court closing the then-recently elected parliament and the Turkish court's insistence on its brand of secularism illustrate.¹⁰⁶ From this perspective, strong-form judicial review may be a luxury rather than a necessity for newer democracies, which must be able to walk with the ordinary judicial independence of a trial court before they can run with the *Bundesverfassungsgericht*.¹⁰⁷

On the second, more internal, element of judicial independence, the risk of resulting politicization occurs in the following way. Because of the power they wield under judicial supremacy, the claim that constitutional court judges should be given whatever partial or indirect democratic accountability they can be given is generally viewed as an irresistible one.¹⁰⁸ As a result, judicial appointments to these courts become political appointments, and, while there are several well-known variations in the precise mode of legislative/executive selection, in almost all forms political affiliation is known and taken into account. As a result, appointments are not only made *by* politicians but are also made (at least in part) *for* political reasons.¹⁰⁹ However, this often leads to constitutional court judges deciding important and close cases along predictable party or ideological lines, which threatens to undermine the second requirement of judicial independence: impartiality. Not in the sense of inputs or pressure—as life tenure or a long, fixed, non-renewable term insulates appointees once in office¹¹⁰—but in terms of outputs, of how courts make their decisions. As John Stuart Mill put it in his *Considerations on Representative Government* (1861): “While there are no functionaries whose special and

106. See David D. Kirkpatrick, *Blow to Transition as Court Dissolves Egypt's Parliament*, N.Y. TIMES, June 14, 2012, available at http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?pagewanted=all&_r=0.

107. The German Federal Constitutional Court is one of the most powerful and influential constitutional courts in the world.

108. Again, Turkey provides the negative example of this point that judicial supremacy without democratic accountability may undermine a constitutional transition. See, e.g., Bâli, *supra* note 18.

109. Of course, political appointments may also just be the result of the government's power and control, as for example in Mubarak's Egypt. See *supra* Part II.D (on Egypt).

110. Renewable terms may make judges concerned about their reappointment. Relatively short fixed, non-renewable terms combined with appointment at younger ages means that judges may be concerned about their post-judicial careers, especially those that are government nominated.

professional qualifications the popular judgment is less fitted to estimate [than judges], there are none in whose case absolute impartiality, and freedom from connection with politicians or sections of politicians, are of anything like equal importance.”¹¹¹

This political or output “connection,” in turn, may undermine their perceived legitimacy and lead frustrated governments to accuse constitutional courts (particularly those with a majority of their predecessors’ appointees, as in Romania or Morsi-led Egypt) of being political bodies rather than independent ones and of abandoning the mantle—and so the protection—of independence, and tempt them to attack the courts. It also points to the limitations of insurance theory from an *ex post*, rather than an *ex ante*, perspective. The judges appointed by the first government may provide political insurance to its members once they are voted out of office by vetoing policies of the second, but they may also be viewed by the second government as political opponents in robes lacking a democratic mandate to obstruct. Of course, in addition to this perception problem, there may also be a more straightforward “reality” problem in that political appointment processes more easily permit governments to fill court vacancies with their supporters and thereby undermine judicial independence directly.

To be sure, these same pressures exist wherever there is strong-form judicial review. It is almost always the controversial constitutional issues, rather than the non-constitutional ones, that trigger calls for proactive measures against the courts. In the United States, it was the striking down of the New Deal legislation that triggered President Franklin D. Roosevelt’s “court-packing plan.” Newspapers routinely print the names of federal judges followed by that of the President who nominated them as an assumed default predictor of political position; “independent” judges are those who vote against the party line. But these pressures are far more dangerous in fragile new democracies where the rule of law and the independence of the judiciary have far shallower roots, and the political costs of direct attack are likely to be lower.¹¹² Here, compliance with court orders cannot ordinarily simply be taken for granted. With respect to impartiality, many (mostly civil law) countries attempt to contain the damage by either or both having (1) a centralized constitutional court, which leaves ordinary judges “untainted” by judicial review, and (2) supermajority requirements

111. John Stuart Mill, *Considerations on Representative Government*, in UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, REMARKS ON BENTHAM’S PHILOSOPHY 188, 368 (Geraint Williams ed., 3d ed. 1993).

112. See, e.g., Epstein, Knight & Shvetsova, *supra* note 19.

for political appointment of its judges, which may reduce their partisanship.¹¹³ But containment is not necessarily a solution: Hungary had both but was not spared.

IV. HOW WEAK-FORM JUDICIAL REVIEW MAY REDUCE THE TENSION

One pragmatic response that acknowledges both the important functions of constitutional review and the fragility of judicial independence in new democracies is for courts to exercise the “passive virtues,”¹¹⁴ to the extent this is possible under the often more compulsory jurisdictions of centralized review. This might include either or both (1) a strategic choice to decide only relatively “safe” or routine cases rather than politically-charged ones about which the elected institutions really care¹¹⁵ and (2) a general norm of issuing cautious, measured judgments rather than bold and provocative ones. The potential problems with this “discretion is the better part of valor” approach are, first, that as an exercise in judicial self-restraint, courts may not be able to resist deciding the “riskier” cases, and second, that these may be exactly the sorts of cases that constitutional courts are created to deal with, where judicial engagement rather than abdication is needed.

A related technique for reducing the tension between constitutional courts and elected governments under strong-form judicial review focuses not on safe cases or cautious judgments on the merits, but on the remedial measures that judges order for constitutional violations.¹¹⁶ Among newer democracies, this technique has been particularly associated with the South African Constitutional Court in the form of the suspended declaration of invalidity that is expressly authorized by the 1996 final constitution¹¹⁷ and had been previously fashioned by the Supreme

113. See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1700–04 (2004).

114. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (2d ed. 1986).

115. Again, this is the explanatory theory of, and prescription for, successful survival of constitutional courts in Epstein, Knight & Shvetsova, *supra* note 19, at 17–20.

116. For the actual and potential use of versions of both these first and second techniques (which he refers to as “dialogic judicial review”) in Asian common law jurisdictions and the argument that this results in more effective rights protection than use of their invalidation powers in the context of strong one-party states in the region, see PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* (forthcoming 2015).

117. S. AFR. CONST. § 172(1)(b)(ii), 1996

Court of Canada.¹¹⁸ In issuing such a declaration, the court “suspends” its invalidity ruling for a specified period pending a legislative remedy, failing which the initial ruling will be activated. Probably the best known use of this power by the South African court was in *Fourie*, the same-sex marriage case, mentioned above,¹¹⁹ where parliament was given one year to enact new legislation to remedy the violation of the right to equality or else the court would read words permitting same-sex marriage into the (offending) 1961 Marriage Act. On the final day of the deadline, parliament did so with the enactment of the Civil Union Act.¹²⁰ Although this remedial tool may sometimes succeed in reducing judicial-legislative tension resulting from the exercise of constitutional review by providing for some legislative/governmental input into the resolution of the constitutional issue, as compared with immediate invalidation, it is still very much an order of the court, imposing a solution on its terms. Indeed, the decision in *Fourie* seems to have been one of the triggers for the government’s verbal attacks on the court, with then-deputy president (and, since 2009, president) Jacob Zuma an outspoken critic of same-sex marriage.¹²¹

A third, more institutional response to the tension between constitutional courts and elected governments is to embed the transitional democracy within a broader, supervisory international regime that will oversee and discipline the government’s responses to judicial decisions. This may also reduce the pressure on domestic courts by enabling them to “pass the buck” and plausibly claim to be applying and enforcing the international mandate for which the government or its predecessor, and not the court itself, was responsible for accepting. This approach has been a major part of the

118. The Canadian Charter is silent on this remedy, but it was first employed as an emergency measure in the 1985 case of *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and “regularized” in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

119. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

120. The date set as the deadline in the *Fourie* judgment of December 1, 2005 was November 30, 2006. The Act permitted two people, regardless of gender, to form either a marriage or a civil partnership, and co-exists alongside the Marriage Act as a second option that couples may choose. An example of a suspended declaration of invalidity that came into effect following the legislature’s failure to act within the court’s one year deadline was the Hong Kong Court of Final Appeal’s judgment in *W v. Registrar of Marriages* [2013] HKCFA 39 (13 May 2013), holding that in denying marriage to transgendered people in their acquired sex the Marriage Ordinance violated the right to marry under article 37 of the Basic Law.

121. See *South Africa: Zuma Slammed for Views on Homosexuality, Same-Sex Marriage*, IRIN (Sept. 27, 2006), <http://www.irinnews.org/fr/report/61195/south-africa-zuma-slammed-for-views-on-homosexuality-same-sex-marriage>.

strategy to support democratic transitions in Central and Eastern Europe since 1989, with memberships in both the European Union and Council of Europe/European Convention on Human Rights serving to provide external discipline and constraints on government action.¹²² Indeed, the willingness of Western European states to subject themselves to the strengthened and more direct supervisory status of the European Court of Human Rights under Protocol 11 to the Convention of Human Rights and Fundamental Freedoms was the result of its perceived necessity vis-à-vis the accession of transitional democracies in Central and Eastern Europe.¹²³ Despite the undoubted general success of this approach, Hungary and Romania are members of both international regimes and have withstood whatever pressure has been brought to bear from these sources.¹²⁴

Weak-form review is a fourth pragmatic response and new constitutional design option that, unlike the first, does not rely on judicial self-restraint but permits courts to decide “risky” cases, and, where deemed necessary, in a bold and vigorous rather than a cautious and measured way. It also promises to provide more genuinely “consensual” or “dialogical” modes of judicial intervention than the suspended declaration of invalidity. How exactly might weak-form review provide an alternative to traditional strong-form review that more reliably reduces the tension resulting in actual or threatened backlashes? In the following two ways, although it must be stressed that we are discussing reduction, not elimination, of the tension. Moreover, the idea is not the naïve, and indeed probably undesirable, one of the complete depoliticization of judicial review,¹²⁵ but rather to address the over-politicization of the strong-form version that creates the greatest practical risk to judicial independence.

A. The Potential Benefits of Weak-Form Review

First, by giving final legal authority to the political institutions, whether exercised or not, weak-form review decreases the overall rivalry and friction between courts and the elected

122. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 66 (2012).

123. *Id.*

124. Several of the specific amendments in the “mega” Fourth Amendment in Hungary reintroduce measures temporarily limited or withdrawn as a result of concerns expressed by the Venice Commission of the European Union.

125. See Graham Gee, *The Persistent Politics of Judicial Selection: A Comparative Analysis*, in JUDICIAL INDEPENDENCE IN TRANSITION, *supra* note 98, at 121.

institutions. In doing so, it holds out the promise of lowering the risk of direct political attacks, which, once instigated, often end in wholesale reductions in judicial independence. In other words, from the perspective of stabilizing democratic transitions, it may be better that the political institutions have a lawful outlet for their disagreements with specific judicial decisions on (some or all) constitutional issues rather than leaving them with only the blunter instruments of general tampering with judicial powers, jurisdictional grounds, composition, or routine constitutional amendment. Apart from its backlash against the courts, the recent Hungarian experience of frequent and wholesale amendment threatens to obliterate the distinction between constitutional and ordinary politics—that is, between the framework and the daily conduct of governance—that is also widely thought to be essential to a successful transition. Accordingly, the question is not only whether to have a constitutional court, but also what available range of review powers to give it, and where the final legal authority is allocated. Once again, judicial supremacy is not an essential part of either judicial independence or constitutional review. A check on legislative or executive power need not amount to an absolute judicial veto within the existing constitution.

Second, where courts have lesser powers of constitutional review, it is easier to resist the call for the type of indirect democratic accountability that a political appointments process is thought to bestow. In this way, weak-form review may result in both more impartial and independent judges and judicial reasoning, and more *direct* democratic accountability for ultimate resolutions of constitutional issues. This contrasts with the more politically tinged and, at the time they are made, wholly unaccountable judicial decisions that are final under standard judicial review. Since establishing its system of weak-form judicial review, the United Kingdom has established a fully independent judicial appointments commission to replace the traditional opaque and clubby method of merit/seniority appointment by the Lord Chancellor.¹²⁶ Such a move towards politically independent appointment is hard to imagine—and perhaps defend—under strong-form review. Even those countries that have moved away from executive control towards appointment by self-governing judicial councils for their ordinary courts—such as Italy, Spain, and Romania—still tend to have a separate, more political appointments process for the constitutional court.¹²⁷

126. This independent judicial appointments commission was established under the Constitutional Reform Act 2005.

127. India is currently an exception, with its self-governing collegium for higher judicial

These two possible benefits of weak-form judicial review are negative: they seek to minimize or reduce the pressures that judicial review places on the independence of the judiciary in the context of transitional democracies. One affirmative potential benefit in this context is that weak-form judicial review may actually help to make democracy look more different on the ground compared to what it replaced, and thus more inspiring. The change from having major political issues decided not through competitive elections and accountable representation but by one non-accountable elite under an authoritarian system to having many of them decided by a different, judicial one under strong-form review may come to strike the ordinary citizen as a form of bait and switch. By flagging constitutional issues for debate rather than taking them off the table, and by alerting the citizenry of judicial concerns, the court-influenced—but not court-centric—nature of weak-form review may help push the political institutions and the electorate towards the types of engaged and competitive public discourse about central issues to which democracies are supposed to aspire.

B. Which Version of Weak-Form Review?

Among existing versions of weak-form judicial review, courts have various powers short of the unreviewable authority to invalidate or disapply statutes that define the strong-form. The first is the power (and duty) to interpret statutes consistently with a bill of rights whenever possible, even where more traditional and constrained modes of statutory interpretation would produce a different result. Where they cannot be so interpreted, the second power is to declare a statute incompatible with the bill of rights. Although such declarations have no legal effect on the statute's continuing validity they typically create political pressure on the legislature to amend or repeal it. A third power of courts is to disapply a statute that they find incompatible with the bill of rights, but subject to a legislative power to immunize the statute from such review or to reinstate it afterwards.¹²⁸

In the context of new and transitional democracies, the (weak-form) interpretive power probably reduces the tension between courts and elective institutions the most, and more than the (strong-form) technique of the suspended declaration of invalidity. This is because

appointments, although there is currently legislation before parliament to establish a new national judicial selection committee.

128. On these three powers, see GARDBAUM, *supra* note 14, at 31–33.

the former effectively involves a judicial offer of a rights-consistent reading of the statute in question, which can either be accepted by legislative inactivity or rejected by affirmative amendment. By contrast, the suspended declaration of invalidity is less an offer of compromise, declinable by the legislature, than the marginally improved terms of legislative defeat. It forces the legislature to act consistently with the judicial view or else have the original law invalidated.

The interpretive power may be supplemented by either of the other two. In fully pragmatic mode, where there is reason to think that legislatures will otherwise overuse or too routinely employ their final authority without it, then a Canadian-style override mechanism might well be preferable, minus its possibility of immunizing statutes from review in the first place. This is because its requirement of affirmatively overriding a court decision generally makes it harder to use as the transparency and political costs of such exercise are likely to be greater than where the judicial decision is declaratory only and has no legal effect, as in the United Kingdom. The partial depoliticization of the courts that I have suggested accompanies weak-form review may even mean that the judicial review carries greater weight and authority among both legislatures and, more importantly, citizens so that the political costs of overriding it are further increased. If still higher hurdles are deemed necessary, then the two-thirds requirement for a legislative override rather than the new Commonwealth model's ordinary majority, as previously in Poland and Romania, can also be considered, which may induce cross-party deliberation and less partisan use. By contrast, if there are contexts in which the danger is rather that the legislative authority may be too little used to reduce the underlying tension, resulting in a build-up that could eventually explode, then the less costly interpretive powers may be employed, either alone or in combination.

C. Conclusion

Especially within a thin and fragile democratic culture, it is important to "spread" constitutional sensibilities and the practice of principled political deliberation more broadly than in the single institution of the constitutional court. While James Bradley Thayer famously warned of the risk that, over time, judicial review would stunt the deliberative capacities of the people and their representatives,¹²⁹ the task of developing these capacities in the first

129. James Bradley Thayer, *John Marshall*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES & FELIX FRANKFURTER ON JOHN MARSHALL 82–88 (1967).

place perhaps counsels even more strongly against viewing constitutional review as something that only courts engage in. Indeed, a second constitutive feature of the new Commonwealth model in the countries that have adopted it is the requirement of mandatory pre-enactment constitutional review of legislation by the political branches. This typically takes the form of a statement by the minister or legislator introducing a bill in parliament on whether or not it is consistent with the constitution, which triggers executive review beforehand and legislative review afterwards.¹³⁰ As an attempted method of instilling constitutional sensibilities within the legislative process and beyond the courts, this form of spreading might also usefully be adopted in transitional democracies.

V. LIMITATIONS OF THE CLAIM

In this final section, I want to underscore and emphasize certain limitations that are built into my central claim. First, I am presenting a pragmatic argument for weak-form review in the context of new and transitional democracies that responds to a real world threat to the stabilization of democracy—a threat that became a reality in several of them over the past few years. That is, given the near-universal creation of constitutional courts in these jurisdictions, weak-form review may help to reduce tensions between governments and courts arising from the exercise of the power of judicial review that risks provoking governments into interfering with their independence, a clearly counterproductive development. The claim is intended to be neither a general normative claim about the relative merits of strong, weak, or no judicial review, nor a universal pragmatic prescription for new democracies. Sometimes, especially where they have widespread public support, constitutional courts are able to withstand political attacks resulting from robust use of their strong-form powers, as with the Indonesian court.¹³¹ Rather, it is presented as a constitutional design option to be considered on its contextual merits as a possible solution to the problem that has recently arisen in several countries and may do so in others. Where

130. See, e.g., GARDBAUM, *supra* note 14, at 79–83.

131. See Fritz Siregar, *Indonesian Constitutional Politics*, I-CONNECT: BLOG OF THE INT'L J. CONST. L. (Oct. 20, 2013), <http://www.iconnectblog.com/2013/10/indonesian-constitutional-politics>. However, more recent decisions of the court demonstrate greater judicial restraint. See Stefanus Hendrianto, *The Indonesian General Election and the "Weak" Constitutional Court*, I-CONNECT: BLOG OF THE INT'L J. CONST. L. (June 4, 2014), <http://www.iconnectblog.com/2014/06/the-indonesian-general-election-and-the-weak-constitutional-court>.

there are reasons for thinking that constitutional courts will be unable or unwilling to exercise the sort of judicial self-restraint that certain difficult and potentially combustible situations call for and that characterized some of the most successful courts in their early years,¹³² then weak-form review may sometimes be a helpful institutional tool as a form of external restraint. Moreover, in certain contexts in which constitutional courts were established under, or captured by, the old, authoritarian regime and continue to serve the same elite or narrow interests after democratization, reducing their powers via weak-form review may be an alternative—or supplement—to altering their composition, mode of appointment, and accountability.¹³³

Second, of course weak-form review by itself will not solve the problem of fragile democracies, any more than traditional strong-form review by constitutional courts alone, and must be part of a package of structural/institutional and other measures designed to reinforce the typical stress points. The most prominent general problem for successful transitions from authoritarianism to stable democracy is the history of overly strong executives and the need to provide meaningful checks on them without either flipping to overly powerful legislatures or rendering the political system ungovernable.¹³⁴ To rely on courts as the first or only line of defense is a recipe for disaster, given their political weakness, their lack of either “sword or purse,” so there needs to be earlier and multiple buffers in place.

For example, Hungary’s parliamentary system has twice enabled Fidesz, by no means a dominant political party of the ANC-type in South Africa, to acquire the two-thirds supermajority needed to amend the constitutional system and engage in what David Landau

132. As is well-known, the U.S. Supreme Court did not invalidate another act of Congress between *Marbury v. Madison*, 5 U.S. 137 (1803) and *Dred Scott v. Sandford*, 60 U.S. 393 (1856), although even in this latter case it is uncertain whether the Court actually invalidated the Missouri Compromise or, having first found that it lacked jurisdiction to hear the case, whether what it said on the subject was dicta. See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861* 281–86 (1976). On the early judicial restraint of the German Constitutional Court, see Niels Petersen, *The Rise of Balancing in German Fundamental Rights Adjudication* (unpublished manuscript) (on file with author).

133. As is arguably the case, for example, in Turkey. See Bâli, *supra* note 18, at 690–97; see also, *supra* notes 72–76 and accompanying text.

134. See Sujit Choudhry & Richard Stacey, *Semi-Presidentialism as a Form of Government: Lessons for Tunisia* 1–3 (Ctr. for Constitutional Transitions at NYU Law, Working Paper No. 2, 2013), available at <http://constitutionaltransitions.org/consolidating-arab-spring>.

has termed “abusive constitutionalism.”¹³⁵ Fidesz achieved this for the first time with just under fifty-three percent of the vote in the 2010 elections and, having employed its supermajority systematically to alter the electoral laws in its favor since then,¹³⁶ for a second time with only forty-four and a half percent of the vote in April 2014. This is the most basic reason it has finally been in a position to instigate the backlash against the courts and undermine judicial independence. Had the more usual “constrained”¹³⁷ form of parliamentarism represented by a more fully proportional representation electoral system been in place, then Fidesz would be governing as a normal majority party but without this unilateral opportunity to employ the constitutional strategy; similarly, if constitutional amendment, either generally or selectively, were less flexible and required more than a one-time two-thirds majority vote of the unicameral legislature.¹³⁸ A third political check, in addition to any judicial one, might have been the semi-presidential form of government that is the most common among new democracies since 1989, in part because at least in theory it divides executive power among three institutions: the presidency, the prime minister/government, and the legislature to which the government is politically responsible.¹³⁹ Finally, the experience of several democracies, both older and newer, testify to the importance of establishing a series of independent institutions in addition to the courts and beyond the “holy trinity”¹⁴⁰ of government functions—legislative, executive, or judicial—to further disperse political power and to provide early-warning signals of potential impending concentration. Such institutions include independent electoral commissions, corruption units, and prosecutorial services.

Accordingly, weak-form judicial review could work alongside, and as a supplement to, other institutional and structural checks on political power. Indeed, especially if employed in combination with a less flexible amendment procedure than a two-thirds vote of a single chamber legislature, weak-form review could perhaps (as already mentioned) be “strengthened” to require a two-thirds override of judicial decisions, as previously in Poland and

135. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195 (2013).

136. Kim Lane Scheppelle, *Hungary, An Election in Question, Part 2*, N.Y. TIMES, Feb. 28, 2014, available at http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/?_r=0.

137. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

138. See Landau, *supra* note 135, at 208–09.

139. See Choudhry & Stacey, *supra* note 134, at 5.

140. See CAROLAN, *supra* note 95.

Romania. This would generally require cross-party support, thereby reducing and moderating its likely use,¹⁴¹ but not perhaps to the point of eliminating its pragmatic usefulness as discussed. Especially from this perspective, there is no magic in the number of necessary votes; if and where two-thirds would likely work better overall than an ordinary majority, then it is the preferred mechanism.

Third, weak-form review may be considered as a temporary expedient during the democratic transition rather than necessarily a permanent institutional feature. Moreover, it could even be employed at different points during the transition; for example, either at the very beginning of the process or later on, if and when tensions have accumulated and look likely to erupt in an attempt to try and prevent possible backsliding towards authoritarianism. Such provisions could be included in the new constitution itself, perhaps with specific triggering requirements, form part of the interim constitution during the constituent assembly phase, or be the subject of initial constitutional amendments as and when needed.

Fourth, in terms of scope as well as timing, weak-form review is not necessarily an all or nothing proposition, but could be employed for varying parts of a constitutional regime, those most likely to risk destabilizing and judicial independence-threatening backlashes. For example, it could apply to rights provisions but not structural components, such as federalism or separation of powers, or to certain rights only but not others.¹⁴² It could apply to legislative action only but not executive, or include a legislative override of judicial decisions on executive power but not an executive override. And it is quite possible that certain “ancillary” judicial functions in transitional democracies, such as oversight of the electoral process, are indeed necessary in a way that judicial invalidation of legislation generally is not.¹⁴³ The scope and domain of weak-form review could thus be tailored accordingly.

Finally, once again, the claim is that weak-form review may sometimes help to reduce political tensions between governments and constitutional courts that threaten the broader transition to stable democracy, not that it will eliminate them. In other words, it is certainly not a guarantee that governments will refrain from

141. One study suggests that approximately ten percent of the constitutional court's decisions were overridden by the Polish parliament between 1990 and 1997. *See* Garlicki, *supra* note 35, at 279.

142. As, for example, under the Canadian Charter of Rights and Freedoms. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

143. *See* Issacharoff, *supra* note 3, at 987.

destabilizing backlashes against courts when they issue unwelcome decisions, which is why it must be supplemented with other political checks. This point is well-illustrated by the backlash in Sri Lanka described above, since, broadly speaking, the 1978 Sri Lankan constitution employs a version of weak-form review. Where a bill is held to be inconsistent with the constitution by the Supreme Court prior to enactment, Article 84(2) empowers the parliament to enact it by a special majority of two-thirds of all its members.¹⁴⁴ Although the Sri Lankan government had the necessary votes and employed this provision to enact the bill (minus the clause requiring a referendum), its decision to impeach the chief justice anyway suggests the desire to make a broader attack on judicial independence as a signal to the courts.

CONCLUSION

Even in those few established democracies with constitutional courts that ever took it seriously, we have become jaded and bored by the so-called “countermajoritarian difficulty.” Apart from familiarity breeding contempt, the reason I believe is that, except in the most unusual circumstances, the “difficulty” is a normative and academic one only. Nothing of major operational import seems to turn on its existence or resolution. By contrast, in the context of new and transitional democracies, the difficulty is intensely practical. It states a real and substantial source of political tension between courts and elected governments in which the continuing independence of the former is very much at stake and cannot simply be assumed *arguendo*.

Constitutional courts perform important, perhaps essential, functions in democratic transitions. They oversee elections and certify their results, they guard against majoritarian excesses, they may be—even where other buffers and filters are in place—the only real check on a dominant political party.¹⁴⁵ On the other hand,

144. See SRI LANKA CONST. art. 84 § 2, Sept. 7, 1978 (This is the general special majority provision.). Article 145G, at issue in the Divi Neguma episode discussed *supra* Part II, is a particular one to the same effect. Although these provisions look similar to constitutional amendment procedures in many constitutions—including the Sri Lankan Constitution itself—the difference between enacting a bill via the special majority procedure and amending the constitution is (as Article 84 § 3 points out) that the statute can subsequently be amended or repealed by an ordinary majority in the normal way. See *id.* at 84 § 3.

145. See Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. COURT REV. 1 (2014).

especially where it is actively exercised, the power of judicial review can and has triggered political backlashes against the judiciary that threatens to reduce or eliminate its independence, a clearly counterproductive development and one that courts often have few powers or means to resist. Accordingly, in many transitional contexts, a careful balance is needed between checking and provoking governments. Sometimes courts can be trusted to get this balance right, exercising wise and cautious political judgment; sometimes not. Sometimes the constitutions they are enforcing may make this more difficult to achieve.¹⁴⁶ Even where they can, this is no guarantee against retaliatory measures that spread to the entire judiciary and undermine its independence. Amid the bullish mood on constitutional courts for new democracies, recent political attacks on them have appeared as shocking, retrograde bolts from the blue. In this context and in fully pragmatic mode, weak-form judicial review should be thought of as a potentially useful new constitutional design option that might sometimes help courts to play a role in keeping certain democratic transitions on course rather than contributing to pushing them off the rails.

146. Justice Albie Sachs of the South African Court has said in answer to the question of whether his court is an activist one: "Yes: but we have an activist constitution." Mpumelelo Mkhabela, *The End of an Era: Retiring Judge Albie Sachs Talks to Mpumelelo Mkhabela About the Most Marvellous Job in the World*, THE NEWS MONITOR, available at <http://www.newsmonitor.co.za/newsmonitor/view/newsmonitor/en/page28457?oid=1065662&sn=Article%20Detail&pid=558&highlight=> (last visited Jan. 7, 2015); see *Tales of Terrorism: I Was Thirty-Nine Years Old and Quietly Teaching Law at Southampton University When I Discovered I was a Terrorist*, SOAS UNIV. OF LONDON (Nov. 2, 2006), <http://www.soas.ac.uk/lawpeacemideast/events/lecture/2006>.